In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. 69.

J. H. ALLISON & COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REJOINDER BRIEF OF PETITIONER.

The brief in opposition filed on behalf of the National Labor Relations Board plainly shows the error of appellee and greatly clarifies this case.

The brief contains a most significant misstatement of fact.*

The mistake of fact to which we refer is the frequently repeated statement that during the formulation of the 1946 contract, there was a "continuing refusal to furnish to the union information concerning merit increases which had been granted."

As we pointed out in our original petition, *there is not one scintilla of evidence in the record to sustain this statement.* Opposing counsel cites the opinion of the Circuit Court of Appeals as sustaining this statement, but nowhere cites the record of the original hearing before the trial examiner. The obvious reason for their failure to cite that record is that *such record fails to disclose such a fact.*

The situation reminds one of Alice's "cunning old Fury." The Board's counsel insists that a fact took place

* It is natural that this mistake should have been made because *the same mistake of fact was in the opinion of the Circuit Court of Appeals.*

because the Board says it took place. However, nowhere in the testimony of the witnesses or in the original hearing is there any evidence whatsoever to this effect.

This is an extremely important mistake, as will hereinafter be shown.

In the final pages of the brief, we find the issues greatly narrowed.

On page 23 of the brief, the Board's counsel states as follows:

> "And like the Board the court below too deemed it unnecessary to decide whether the employer's conduct during the term of the 1945 contract constituted an unfair labor practice. It pointed out that the alleged 'unseasonableness of the demand of May 2, 1945' could not dispose of the case because 'the demand for the information was renewed later during the negotiations for the 1946 contract.* Moreover, the constant position of (the employer) has been and now is that merit increases are not, under the National Labor Relations Act, a proper subject for collective bargaining; * * *."

Thus we find the controversy in this case narrowed as follows:

1. The Board does not insist—and claims that neither the Board nor the Court below insisted—that it was unlawful for this employer to refuse to furnish the list in question in May, 1945. This question is definitely pretermitted—although we had been under the impression that the court below did not pretermit it. In any event, by the admission of counsel in their brief, its pretermission is now conceded.

2. The Board insists that the real basis for the finding of a refusal to bargain was *the refusal to furnish the information during the formulation of the 1946 contract.* This is a purely factual basis, and if the facts existed to

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* But it was not!

sustain it, we are quite frank to say that we think the Board would be correct. However, as previously pointed out—there is no evidence whatsoever in the record, except in the opinions of the Board and the court (and that is not evidence!) to sustain this fact.

3. Counsel for the Board goes further and insists that ultimately the true basis for the finding of a refusal to bargain is *the attitude of this employer*. In other words, they insist that the real crime committed by this company *was its attitude*. But we respectfully submit that a finding of a commission of an unfair labor practice must be based upon objective fact, and not merely upon an attitude.* It must be based upon the commission of an act, or the refusal to commit an act, and not merely upon what the Board assumes to be a mental state.

None of the cases cited by counsel for the Board is even remotely in point, as the facts and circumstances in those cases are totally different from those of the case at bar.

We insist that the brief in opposition demonstrates all the more forcefully the necessity for a consideration of this important case by this Honorable Court.

Respectfully submitted,

JOHN A. CHAMBLISS, JR.,
For Petitioner.

CHAMBLISS, CHAMBLISS & BROWN,
Of Counsel.

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*Especially when the attitude that is assumed to exist did not actually exist!

This employer did feel that *under the existing contract* it could grant merit increases without consulting with the union. But it also recognized that at the time of negotiating a contract, the union was (a) entitled to a list of merit increases that had been granted; and (b) entitled to bargain for a contract that would make merit increases throughout the year *contractually* subject to bargaining.